

April 6, 2018

Mary Becerra  
Secretary of the Commission  
Indiana Utility Regulatory Commission  
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Indianapolis, Indiana 46204  
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*Electronically delivered*

RE: Reply to I&M's Response to CAC and ELPC Objection

**Reply to I&M's Response to Objection on behalf of  
Citizens Action Coalition and the Environmental Law & Policy Center**

Pursuant to Rule 170 IAC 1-6-7(d)(1), which states that 30-Day filings that have not been resolved to the satisfaction of the objector shall not be presented for Commission approval, Citizens Action Coalition ("CAC") and the Environmental Law & Policy Center ("ELPC") respectfully submit this Reply to express their lack of satisfaction with I&M's Response, filed on April 2, 2018, to CAC and ELPC's Objections filed on March 23, 2018. The Commission's procedures allow a party to reply to a response in similar contexts. *See, e.g.* 170 IAC 1-1.1-12(f). The Objections and Response at issue concerns I&M's 30-day filing, filed on March 1, 2018, IURC 30-Day Filing No. 50125.

I&M's response failed to satisfy ELPC and CAC's objection, as required by 170 IAC 1-6-7(d)(1), and the response raised a number of issues demonstrating why the Commission should open an investigation into Indiana's implementation of PURPA. There are three key reasons why the Commission should deny I&M's 30-day filing and open an investigation into Indiana's PURPA implementation.

**1. I&M's Standard Contract Is Not "Long Term," as Required by Indiana Law.**

Indiana law requires standard contracts be "long term." Burns Ind. Code Ann. § 8-1-2.4-4(a). Furthermore, FERC has stated that standard contracts must be "long enough to allow QFs reasonable opportunities to attract capital from potential investors." *Windham Solar LLC and Allco Finance Limited*, 157 F.E.R.C. P61,134, at ¶ 8 (2016).

I&M's five-year standard contracts are not "long term" and do not "allow QFs reasonable opportunities to attract capital from potential investors." The Commission has never issued any order interpreting the "long term" requirement, as evidenced by the fact that I&M does not cite any Commission order when it alleges "[t]his Commission has previously exercised its broad discretion in this area to determine that I&M's provision of contracts for up to five years is appropriate. . ." I&M Response at 4. I&M also alleges that contracts longer than five years would harm ratepayers, but provides no evidentiary support.

In its objections to Duke Energy Indiana's 30-day filing, IURC 30-Day Filing No. 50119,

ELPC and CAC submitted an affidavit from a potential QF developer that explained contract term lengths must be at least 15- to 20-years in order to allow QFs reasonable opportunities to obtain financing. *See* Affidavit of Sam Kliever at ¶ 3.<sup>1</sup> According to this potential QF developer, I&M’s 5-year standard contract would not “long enough to allow QFs reasonable opportunities to attract capital from potential investors.” *Windham Solar LLC and Allco Finance Limited*, 157 F.E.R.C. P61,134, at ¶ 8 (2016). This evidence conflicts with I&M’s own opinions of what is reasonable to obtain QF financing.

In addition, a review of EIA data containing a list of all generators shows that I&M currently has no small power production QFs in its Indiana service territory,<sup>2</sup> and ELPC and CAC are not aware of any small power production QFs in I&M’s Indiana service territory. The lack of any QF activity in I&M’s Indiana service territory is evidence that its five year standard contract and SPP tariff are not “encourage[ing] the development of alternate energy production facilities.” Burns Ind. Code Ann. § 8-1-2.4-1.

The Commission should open an investigation into adequate contract term lengths because this is an issue of first impression in Indiana and because there is a drastic difference between the beliefs of I&M and potential QF developers on adequate term lengths. The lack of any QF development in I&M’s Indiana service territory, according to EIA data cited above, to show that I&M’s current framework is not adequate to encourage development of QFs.

## **2. I&M Has Not Complied With All Requirements of 18 C.F.R. § 292.302(b).**

As CAC and ELPC noted in their Objection, I&M does provide the information required by 18 C.F.R. § 292.302(b)(1) on an annual basis.

In its response, I&M stated that its November 2015 IRP also contains the information required by 18 C.F.R. § 292.302(b)(2)-(3) (capacity additions over 10 years and their costs). I&M Response at 6. However, because 18 C.F.R. § 292.302(b) requires this information to be filed at least every two years, I&M is not in compliance because it has not filed the information required by § 292.302(b)(2)-(3) in the last two years.

In addition, although I&M’s November 2015 IRP does show its planned capacity additions over the next ten years,<sup>3</sup> as required by 18 C.F.R. § 292.302(b)(2), nowhere in the IRP does it contain the “estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour.” 18 C.F.R. § 292.302(b)(3).

Perhaps these estimated capacity costs are available in the non-public version of the IRP, but that too fails to comply with the regulation. The regulation states that utilities “shall maintain for public inspection” these “estimated capacity costs.” 18 C.F.R. §§ 292.302(b), 292.302(b)(3). The “public inspection” requirement preempts application of trade secret or confidential

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<sup>1</sup> This affidavit was filed with ELPC and CAC’s Objection to Duke Energy Indiana’s 30-day filing.

<sup>2</sup> <https://www.eia.gov/electricity/data/eia860/> (last updated Nov. 2017).

<sup>3</sup> I&M, 2016 INTEGRATED RESOURCE PLAN at 118 (Nov. 2015), available at <https://perma.cc/9RHR-QZ46>.

treatment of the information required to comply with this regulation.<sup>4</sup> If I&M wants to use its IRP to comply with 18 C.F.R. §§ 292.302(b)(3), then it cannot shield those estimated capacity costs from public view.

I&M's lack of compliance with 18 C.F.R. § 292.302(b) undermines the purpose of these avoided cost informational filings and this lack of compliance demonstrates the need for Indiana to investigate the issue further.

**3. There Are Currently No Federal Investigations or Rulemakings into PURPA, and Even If There Were, It Should Not Stop the Commission from Exercising its Duly-delegated Authority to Implement PURPA and State Law.**

I&M believes an investigation of PURPA implementation is not warranted in Indiana because there are already federal investigations into PURPA ongoing and therefore the State should allow the federal government to dictate what Indiana should do. I&M Response at 4-5. However, contrary to I&M's assertions, there are no active FERC investigations or rulemakings related to PURPA. I&M cited to a FERC order soliciting comments in Docket AD16-16, but FERC created that docket solely for its 2016 PURPA technical conference.<sup>5</sup> Conference participants filed their comments in Fall 2016, and FERC has taken no action and conducted no investigation or rulemaking following those comments.

I&M misrepresented statements made by FERC's Chairman Neil Chatterjee. On October 30, 2017, Representative Tim Walberg sent a letter to FERC asking FERC to update its PURPA regulations. *See* Exhibit C. On November 29, 2017, FERC Chairman Neil Chatterjee responded with a two-paragraph letter and did not initiate an investigation or rulemaking in response to Walberg's letter. *See* Exhibit D. Nevertheless, I&M attempts to use an excerpt of Neil Chatterjee's letter to explain "the purpose of this investigation," I&M Response at 4, even though no such investigation exists and the Chairman's letter does not reference an active investigation or rulemaking.

I&M also cited to a recent bill introduced in Congress as evidence of another federal investigation. That bill, titled the PURPA Modernization Act, H.R. 4476, has sat in a House of Representative subcommittee since December 1, 2017 and has yet to be offered up for a vote.<sup>6</sup>

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<sup>4</sup> *See In Re Investigation of Central Maine Power Company's Resource Planning, Rate Structures, and Long-Term Avoided Costs (Rate Design Phase)*, Docket No. 92-315, 1995 Me. PUC LEXIS 11 at \*13-14 (Jan. 27, 1995 Me. Pub. Util. Comm'n). The Maine Public Utilities Commission stated:

Plainly, under this federal regulation, the specified avoided cost information must be filed with state regulatory agencies and the information must be publicly available. The federal regulation expressly regulates state activities and, under the supremacy clause, undoubtedly precludes any state action that would make the specified information not publicly available, e.g., pursuant to state trade secret protection law.

*Id.* at \*13.

<sup>5</sup> *See Notice of technical conference re Implementation Issues under the Public Utility Regulatory Policies Act of 1978*, Docket No. AD16-16 (F.E.R.C. Feb. 9, 2016) available at <https://perma.cc/TKU5-CBW9>; *see also Supplemental Notice Concerning Technical Conference*, Docket No. AD16-16 (F.E.R.C. Mar. 4, 2016) available at <https://perma.cc/A9TV-DLZW>.

<sup>6</sup> *See* <https://www.congress.gov/bill/115th-congress/house-bill/4476/all-actions>

Even if it passes the committee stage, it is unlikely to pass the full House of Representatives or the Senate. In addition, the legislation only effects the size of QFs and how PURPA could interact with integrated resource plans—it has nothing to do with adequate contract term lengths under Indiana law or compliance with 18 C.F.R. 292.302(b).

I&M's reliance on federal activity as a reason for why the Commission should not open an investigation rings hollow. PURPA operates under a cooperative federalism framework whereby FERC issued the primary regulations but the State of Indiana is delegated authority to implement those regulations at the state level. *See* 16 U.S.C. § 824a-3(f). Indiana has adopted state laws and regulations to implement these requirements, including a state law that directs the commission to require electric utilities to enter into long-term contracts with alternate energy production facilities. Burns Ind. Code Ann. § 8-1-2.4-4(a). The existence, or not, of federal proceedings related to PURPA in no way negates the Commission's responsibility to implement and enforce existing state law. Finally, PURPA provides the Commission with the discretion to determine issues like contract term lengths, and, therefore, Indiana's discretion and authority to investigate such issues is unaffected by the hypothetical existence of federal investigations into matters unrelated to Indiana's requirement for "long term" contracts. Burns Ind. Code Ann. § 8-1-2.4-4(a).

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Indiana should use its considerable discretion under PURPA to deny approval of I&M's 30-day filing and open an investigation into PURPA implementation in the State. Issues for investigation should be adequate contract term lengths, compliance with 18 C.F.R. 292.302(b)'s biennial avoided cost information requirements, and other issues that the Commission determines are relevant. Other relevant issues could be how utilities calculate their avoided energy cost rates and whether the standard offer tariff and standard contracts should be available to QFs larger than 100 kW.

Dated April 6, 2018

Respectfully submitted,



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AD 16-16

**Congress of the United States**  
**Washington, DC 20515**

OFFICE OF  
EXTERNAL AFFAIRS

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October 30, 2017

FEDERAL ENERGY  
REGULATORY COMMISSION

The Honorable Neil Chatterjee  
Chairman  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

Dear Mr. Chairman:

We are writing to urge the Federal Energy Regulatory Commission (FERC) to update its implementing regulations for the Public Utility Regulatory Policies Act (PURPA). As you know, PURPA was enacted in 1978 in response to an oil crisis. Over the last 40 years, we have seen dramatic changes in energy markets that have resulted in an abundance of domestic energy supplies. Two of the most significant changes have been the development of competitive wholesale electricity markets, which enable qualifying facilities (QFs) under PURPA to reach more willing buyers, and the declining costs for natural gas and renewable energy resources. These developments, along with others, have changed both the economics of QF development, as well as the impact of an increasing amount of QF output being placed on the transmission grid.

While there are aspects of the reform of PURPA that will require congressional action, there are also regulatory changes that FERC can make to ensure that its implementing regulations reflect the changes occurring in electricity markets. Many of these changes are already familiar to FERC and were addressed at the technical conference that your agency held on June 29, 2016, in Docket No. AD16-16-000. Among the issues addressed at the conference was the purported gaming of FERC's "one-mile rule" (see 18 CFR § 292.204(a)(2)) by certain QF developers. More than a year later, the House Energy and Commerce Subcommittee on Energy heard testimony during its September 6, 2017, hearing on PURPA, that some QFs are continuing to take advantage of FERC's regulations to effectively build projects that exceed the various size thresholds in the wholesale electricity markets regulated by FERC. However, since FERC has made clear in its decisions that its one-mile rule is irrebuttable, parties involved cannot challenge the lawfulness of these projects.

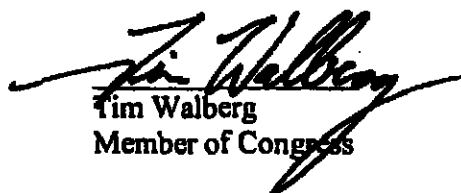
Eliminating the opportunity for certain QF developers to game FERC's one-mile rule will directly benefit electricity customers, who are paying billions of dollars in above-market prices for QF power sold under mandatory PURPA contracts. While the Energy and Commerce Committee considers additional reforms to PURPA, we encourage FERC to address the concerns raised at its 2016 technical conference and to use its authority to undertake needed modernization to the Commission's PURPA one-mile rule regulations while taking into consideration non-geographic factors as well.

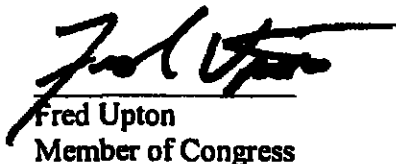
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As Congress continues its review of PURPA, we request the list of changes and reforms the Commission believes it can make under its existing authority.

We look forward to working with the Commission to ensure our constituents can benefit from lower cost electricity, more competitive markets and advancements made in renewable generation.

Sincerely,

  
Tim Walberg  
Member of Congress

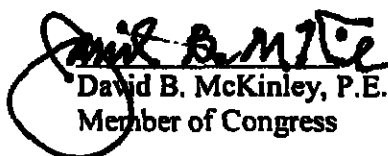
  
Fred Upton  
Member of Congress

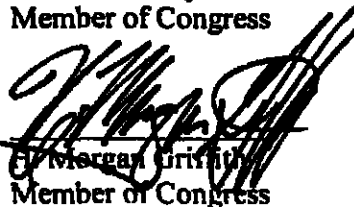
  
Joe Barton  
Member of Congress

  
Marsha Blackburn  
Member of Congress

  
Robert E. Latta  
Member of Congress

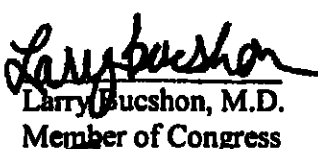
  
Gregg Harper  
Member of Congress

  
David B. McKinley, P.E.  
Member of Congress

  
H. Morgan Griffith  
Member of Congress

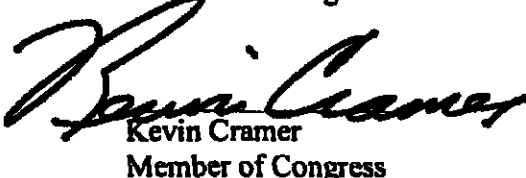
  
Bill Johnson  
Member of Congress

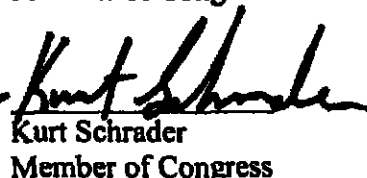
  
Dave Loebsack  
Member of Congress

  
Larry Bucshon, M.D.  
Member of Congress

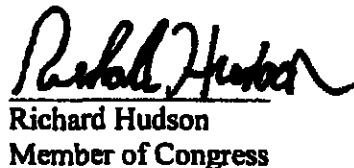
  
Bill Flores  
Member of Congress

  
Markwayne Mullin  
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Kevin Cramer  
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**RECEIVED  
NOV 29 2017****FEDERAL ENERGY REGULATORY COMMISSION**

WASHINGTON, DC 20426

November 29, 2017

**OFFICE OF THE CHAIRMAN**

The Honorable Tim Walberg  
U. S. House of Representatives  
Washington, D.C. 20515

Dear Congressman Walberg:

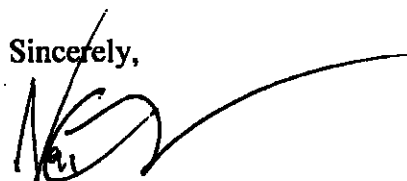
Thank you for your October 30, 2017, letter regarding the Public Utility Regulatory Policies Act of 1978 (PURPA).

The energy landscape that existed when PURPA was conceived was fundamentally different than it is today; solar and wind power were fledgling technologies, there was no open access to wholesale electricity markets, and natural gas was in scarce supply. None of those things are true today. In light of such changes, I believe that the Commission should consider whether changes in its existing regulations and policies could better align PURPA implementation with modern realities.

As you know, the Commission held a technical conference on June 29, 2016, in Docket No. AD16-16-000, to examine issues related to PURPA. Subsequently, the Commission solicited written comments from interested parties, which were submitted by November 7, 2016. One particular area where many parties have indicated a need for a different approach is the "one-mile rule" for qualifying facilities. Of course, other such areas may exist, too, and we owe it to stakeholders to continue taking a hard look at our regulations to identify those opportunities for improvement. Please be assured that I will keep your concerns in mind as the Commission explores these important issues. Your letter and this reply will be placed in the public record of Docket No. AD16-16-000.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,



Neil Chatterjee  
Chairman

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